



February 1, 2016

Via Regulations.gov

Docket ID No. EPA-HQ-OW-2015-0753
Environmental Protection Agency
Health and Ecological Criteria Division, Office of Water (Mail Code 4304T)
1200 Pennsylvania Avenue NW
Washington, DC 20460

Re: EPA's draft recommended aquatic life water quality criteria for cadmium. 80 Fed. Reg. 75,097 (Dec. 1, 2015).

Thank you for the opportunity to comment on EPA's recommended aquatic life water quality criteria for cadmium. We are disappointed that EPA is weakening both the acute and chronic freshwater standards for cadmium, but appreciate the agency providing heightened protections for marine/estuarine waters. We ask that EPA complete consultations under Section 7 of the Endangered Species Act with U.S. Fish and Wildlife Service and the National Marine Fisheries Service and coordinate under the Fish and Wildlife Coordination Act before finalizing these criteria. Until consultations and coordination is complete, EPA cannot ensure it is adopting legally defensible criteria for cadmium.

1. EPA Ignored Significant Sources of Cadmium From The Coal Industry

In the description of sources of cadmium, EPA overlooks the contribution of cadmium from coal combustion and coal mining waste. Coal ash ponds spill and seep, and the discharge of waste water from coal ash pits are all additional sources of cadmium. "There are nearly a thousand sites at which coal ash is disposed across the nation: 584 surface ponds and 337 dry landfills."¹ These important sources of cadmium need to be recognized and addressed by EPA.

2. The Criterion Must Protect All Threatened or Endangered Species And EPA Must Consult Upon Its Recommend Criteria Under the ESA

Water quality standards under the Clean Water Act ("CWA") must protect all existing uses in a waterbody, and such "uses" often include supporting species that are listed as threatened or endangered pursuant to the Endangered Species Act.² Additionally, under Section 7 of the Endangered Species Act ("ESA") and its implementing regulations each federal agency, in consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service

¹ Coal Ash Toxics: Damaging to Human Health (<http://www.psr.org/assets/pdfs/coal-ash-toxics-damaging-to-human-health.pdf>).

² 33 U.S.C. § 1313.

(hereafter jointly “Services”)³ must insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species.⁴ “Action” is broadly defined to include actions that may directly or indirectly cause modifications to the land, water, or air, and actions that are intended to conserve listed species or their habitat.⁵ EPA thus must ensure that any criteria that it recommends to states for adoption will be fully protective of listed species.

EPA’s duty to complete its Section 7 consultation process prior to finalizing any recommended criterion is firmly established by the text of the ESA and by the Memorandum of Agreement that EPA entered with the Services to clarify the procedures for ESA compliance in taking action under the CWA. The latter document states that:

EPA and the Services will conduct a section 7 consultation on the aquatic life criteria to assess the effect of the criteria on listed species and designated critical habitat. EPA and the Services will also conduct a conference regarding species proposed for listing and proposed designated critical habitat. EPA will consider the results of this consultation as it implements and refines its criteria program, including decisions regarding the relative priorities of revising existing criteria and developing new criteria.⁶

EPA asserts that the meaning of water quality criteria in Section 304(a)(1) of the CWA, is a “a non-regulatory, scientific assessment of ecological and human health effects.”⁷ However, EPA also correctly notes that these:

Criteria in water quality standards establish *the maximum acceptable pollutant concentrations in ambient waters protective of the state’s designated uses*. States may adopt water quality criteria in their water quality standards that have the same numerical values as EPA’s recommended section 304(a)(1) criteria. However, states may decide to adopt water quality criteria different from EPA’s section 304 recommendations to reflect local environmental conditions and human exposure patterns.⁸

Thus, the establishment of water quality criteria under Section 304(a)(1) is an action for purposes of Section 7 because such criteria set the ceiling for establishment of water quality standards. Even if water quality criteria are not regulatory per se, like a Forest Management Plan under the National Forest Management Act or similar federal agency acts, consequences still flow from the establishment of the criteria. The federal act of establishing these criteria has both direct and

³ Because EPA is developing both freshwater and estuarine /marine standards, consultations with both Services is necessary here.

⁴ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

⁵ 50 C.F.R. § 402.02.

⁶ Memorandum of Agreement Between the Environmental Protection Agency, Fish and Wildlife Service and National Marine Fisheries Service Regarding Enhanced Coordination Under the Clean Water Act and Endangered Species Act at 11 (Jan. 2001).

⁷ Draft Cadmium Criteria at iv.

⁸ *Id.*

indirect effects for species, especially since methodologies are chosen and species get excluded from consideration now with consequences for how states may proceed in establishing water quality standards. Additionally, criteria for toxic pollutants under Section 303(b) are less “optional” than criteria developed for non-toxic pollutants. This makes the adoption of criteria for toxics certainly more “regulatory” in nature.⁹

Moreover, there are indications from the record that Section 7 consultations would be beneficial here. For example, EPA and peer reviews disagreed over the effects of bioaccumulation of cadmium and how it may enter the food chain.¹⁰ Concerns were also raised over the limited species used to generate the hardness correction for the freshwater chronic toxicity data set¹¹ and EPA’s failure to incorporate a biotic ligand model or BLM, including for dissolved organic carbon or DOC, into the process used to revise the criteria.¹² Involving biologists from the Services could benefit resolution of these and presumably other issues related to the establishment of criteria for cadmium.

EPA also has an independent obligation under Section 7(a)(1), to “carrying out [its] programs for the conservation of endangered species and threatened species.”¹³ By consulting on national criteria and coordinating with the Services, EPA can move toward meeting its Section 7(a)(1) obligations.

3. The Criterion Must Protect Aquatic-Dependent Wildlife

The Clean Water Act mandates that water quality standards protect not only fish, but all aquatic organisms and other wildlife that depend on healthy streams. Section 303(c) requires that such standards “shall be established taking into consideration their use and value for . . . propagation of fish and wildlife,” among other things.¹⁴ EPA’s regulations require states to develop standards that will “[s]erve the purposes of the Act,” meaning that they will “provide water quality for the protection and propagation of fish, shellfish and wildlife,” among other things.¹⁵

We are concerned about the focus upon fish in developing these criteria and the need for EPA to bring in other species including insects and freshwater mussels into the process for developing criteria for cadmium. Without a more holistic picture of the freshwater species at play, the criteria cannot be protective of *all* aquatic dependent wildlife.

⁹ 40 C.F.R. § 401.15(11) (listing cadmium and compounds on the toxic pollutants list).

¹⁰ EPA Response to Peer Review at 10-11, 12,

¹¹ *Id.* at 14.

¹² *Id.* at 18.

¹³ 16 U.S.C. § 1536(a)(1).

¹⁴ 33 U.S.C. § 1313(c)(2)(A) (emphasis added); *see also id.* § 1252(a) (directing states to develop comprehensive programs for controlling water pollution giving due regard to improvements necessary to “conserve such waters for the protection and propagation of fish and aquatic life and wildlife”).

¹⁵ 40 C.F.R. § 130.3.

4. EPA Should Coordinate With the Fish and Wildlife Service to Address Impacts of Cadmium on Non-Endangered Wildlife.

The Fish and Wildlife Coordination Act (“FWCA”)¹⁶, gives the U.S. Fish and Wildlife Service (“FWS”) broad authority to protect freshwater wildlife resources through coordination and providing assistance to all federal agencies regarding actions that may impact U.S. waters. To ensure that the final cadmium water quality criteria is fully protective of all types of wildlife, EPA should engage the FWS broadly — not just as is clearly legally required by the ESA — but also engage other divisions of the FWS that may have additional expertise and information that would benefit the EPA.

Congress expected that the EPA would develop water quality criteria with input from the FWS and other federal agencies. At its outset, Section 304(a) states “The Administrator, *after consultation with appropriate Federal and State agencies* and other interested persons, shall develop and publish” water quality criteria.¹⁷ Furthermore, Section 511 of the CWA¹⁸, affirms that the CWA does not limit or preclude this type of coordination under the FWCA. In passing the original CWA, the House and Senate proposed different versions of Section 511. The Senate version would have limited “the consultation and coordination requirements of the Fish and Wildlife Coordination Act . . . to the provisions of section 306, the publication of information under section 304 and the establishment of guidelines under section 403 but not to the imposition of any specific effluent limitation on a particular source.”¹⁹ The House version did not contain a limitation on the scope of the Fish and Wildlife Coordination Act, and ultimately, the Congress adopted a compromise version that did not limit the scope of the Fish and Wildlife Coordination Act.²⁰ Clearly, though, Congress intended that EPA would involve the FWS in many aspects of the CWA’s implementation.

Coordination under the FWCA should not be burdensome or formalistic. But the reality is that EPA has consistently and systemically failed to fully consider the impacts of its proposals on aquatic wildlife. One of Congress’ stated goals in passing the CWA was to achieve “water quality which provides for the protection and propagation of fish, shellfish, *and wildlife*.”²¹ Despite this clear statement of a national goal, and despite the repeated inclusion of wildlife as a top priority for protection under the CWA, EPA has consistently failed to fully consider aquatic-dependant wildlife in the development of national criteria.²² The Center recommends that EPA

¹⁶ 16 U.S.C. § 661 *et. seq.*

¹⁷ 33 U.S.C. § 1314(a)(1).

¹⁸ 33 U.S.C. § 1371.

¹⁹ S. REP. 92-414, 92nd Cong. (1 972), *reprinted in*, 1972 U.S.C.C.A.N. 3668, at 3751.

²⁰ S. CONF. REP. 92-1236 (1972)

²¹ 33 U.S.C. §1251(a)(2) (emphasis added).

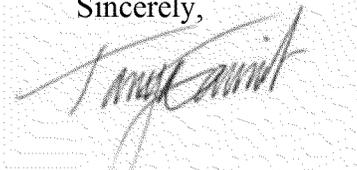
²² 33 U.S.C. § 1314(a)(1) (“The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish. . .from time to time thereafter. . .criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, *wildlife*, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water”); 33 U.S.C. § 1314(a)(2) (“The 'Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish. . .information. . .on the factors necessary for the protection and propagation of shellfish, fish, and *wildlife*. . .”); 33 U.S.C. § 1314(a)(5)(A) (“the Administrator, to the extent practicable before consideration of any request under section 1311(g) of this title and within six months after

develop water quality criteria that are fully protective of all types of wildlife, including taxonomic groups that EPA routinely overlooks and omits from its analysis. Using the FWCA coordination process as a framework to achieve this would strengthen the final cadmium criteria.

CONCLUSION

We appreciate this opportunity to comment and hope that EPA complies with its obligations under the CWA, ESA, and FWCA before finalizing new aquatic life water quality criteria for cadmium.

Sincerely,

A handwritten signature in black ink, appearing to read "Tanya Sanerib", is written over a rectangular area with a light gray dotted background.

Tanya Sanerib, Senior Attorney
Brett Hartl, Endangered Species Policy Director
Center for Biological Diversity

December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish and *wildlife*, and to allow recreational activities, in and on the water.”).